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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

GIANT FOOD INC., *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, GIANT FOOD INC., prays that a writ of certiorari issue to review the final decree of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled cause affirming and enforcing a cease and desist order previously entered by the respondent, Federal Trade Commission, hereinafter "the Commission." The cease and desist order is reprinted herein as Appendix "A."

JURISDICTION

This Court has jurisdiction of the above-entitled cause and this petition by virtue of Section 1254(1) of Title 28 of the United States Code. The final decree of the Court of Appeals for the District of Columbia Circuit, which is reprinted herein as Appendix "B," was entered on October 14, 1963. Rehearing and/or rehearing *en banc* were denied on the same day.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is officially reported at F.2d . It is reprinted herein as Appendix "C." The opinion of the Federal Trade Commission is officially reported at FTC . The Commission's opinion and order are printed as part of the Joint Appendix at pages 73 et seq. The initial decision of the Hearing Examiner is not officially reported. The initial decision and order are printed as part of the Joint Appendix at pages 46 et seq.

QUESTIONS PRESENTED

1. Is the petitioner denied due process of law by an order of the Federal Trade Commission which fails to provide ascertainable standards for interpreting the conduct which the order proscribes, particularly where the literal proscriptions of the order apply to practices which are clearly lawful and severe penalties are prescribed for violation of the order?

2. Is the petitioner denied the hearing which the Federal Trade Commission Act specifically requires as a condition precedent to a Commission order where an order of the Federal Trade Commission exceeds the

Commission's statutory authority by prohibiting practices which are not related to or typified by the practices which were the subject of the Commission's complaint, record and decision?*

STATUTES INVOLVED

The Federal Trade Commission Act, 52 Stat. 111 (1938), as amended, hereinafter "the Act," 15 U.S.C. 41 et seq., proscribes "unfair or deceptive acts and practices in commerce." Section 5(b), 15 U.S.C.

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*In the event certiorari is granted, the following additional questions will be presented:

1. Whether the Commission's decision and order denied petitioner due process of law by reason of the fact that the decision and order are based upon hearings and a record resulting therefrom which (a) did not afford petitioner a fair, reasonable, or adequate opportunity to cross-examine witnesses produced by the Commission whose testimony was vital and material to the issues, the decision and order; and (b) did not afford petitioner an opportunity to adduce evidence which was vital and material to the issue, the decision and order;

2. Whether the acts and practices charged by the complaint and/or in which petitioner was found to be engaged constitute unfair methods of competition or unfair and deceptive acts and practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act;

3. Whether the Commission's decision and order are beyond the scope of the Commission's authority and jurisdiction inasmuch as the Commission has, by its decision and order, proscribed practices which have not heretofore been defined as unfair methods of competition or as unfair and deceptive acts and practices in commerce and which are counter to the competitive antitrust policies established by the Sherman Act, 15 U.S.C. 1, and the Automobile Information Disclosure Act, 15 U.S.C. 1231;

4. Whether the Commission's Findings of Fact and Conclusions of Law are supported by substantial evidence upon the whole record.

45(b), authorizes the Commission to prevent such acts and practices and provides in pertinent part:

> "(b) Whenever . . . it shall appear to the Commission that a proceeding by it in respect [to an unfair or deceptive act or practice] would be in the interest of the public, it shall issue and serve . . . a complaint stating its charges. . . . The person [charged] . . . shall have the right to appear . . . and show cause why an order should not be entered by the Commission requiring [the person charged] to cease and desist from the violation of the law so charged in said complaint. . . ."

The Act allows any person who is subject to a cease and desist order of the Commission to obtain review of the order in a United States Court of Appeals. On review, the Court of Appeals is vested with:

> ". . . jurisdiction of the proceeding and of the questions determined therein concurrently with the Commission . . . and [has] power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. . . . To the extent that the order of the Commission is affirmed, the [reviewing] court shall thereupon issue its own order to command obedience to the terms of such order of the Commission. . . ." Section 5(c), 45 U.S.C. 45(c).

The sanction for each violation of any final order entered by the Commission is a civil penalty of $5000. Section 5(l), 15 U.S.C. 45(l). Upon certification of the facts by the Commission, the Attorney General is authorized to enforce the penalty provisions of the Act in a United States District Court. Section 16, 15

U.S.C. 56. As an alternative, the Commission may, when a United States Court of Appeals has entered "its own order" enforcing the Commission's order, enforce the Court of Appeals order in contempt proceedings in the Court of Appeals.

STATEMENT OF THE CASE

The respondent, Federal Trade Commission, entered an order in the above-entitled cause, which when enforced[1] will require the petitioner to cease and desist using the words "regular price," "mfg. list," words of similar import, or any other words descriptive of price unless the price described is either the petition's own "usual and customary" price or the "usual and customary retail selling price . . . in the trade area." (Appendix "A")

The order followed and was predicated upon a complaint, a hearing and a record which were limited exclusively to petitioner's use of the terms "regular price," and "mfg. list" in newspaper advertising of two confined lines of merchandise: kitchenwares and small electrical appliances. The complaint (J.A. 12 et seq.) alleged in pertinent part by way of example[2] that petitioner, which operates more than 50 stores in the District of Columbia, Maryland, and Virginia, advertised a "G.E. Portable Mixer," with a "Mfg. List—$19.95" for "$13.27," in one or more of the District of Columbia's major newspapers. The complaint as-

[1] Issuance of a Court of Appeals order enforcing the Commission's order has been stayed pending a decision on this petition.

[2] The complaint made similar allegations with reference to a series of kitchenwares and small electrical appliances, which it listed in Paragraph 4. At hearing, the Commission limited its proof to the articles listed in Paragraph 4 of the complaint.

serted that petitioner had, through the use of the statement "Mfg. List—$19.95" represented that the "Mfg. List" was the price at which the "G.E. Portable Mixer" was "usually and customarily sold at retail" and that purchasers of the G.E. Portable Mixer would be afforded savings equal to the difference between $19.95 and $13.27. These representations, the complaint said, were "false, misleading and deceptive" because the "mfg. list" was substantially in excess of the price at which the "G.E. Portable Mixer" was "usually and customarily sold at retail." Purchasers of the "G.E. Portable Mixer," the Commission asserted, were not "afforded savings" equal to the difference between the "mfg. list" and petitioner's advertised selling price.

Asserting that petitioner's "false, misleading and deceptive" use of the term "mfg. list" had the "capacity and tendency to mislead members of the purchasing public," the Commission's complaint charged petitioner with having engaged in "unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act."

In its answer, petitioner denied that its advertisements were "false, misleading or deceptive." (J.A. 19 et seq.) Petitioner also denied having engaged in any unfair or deceptive acts or practices or any unfair methods of competition. Petitioner asserted (J.A. 21-22), and at hearing proved (J.A. 99-104), that it had abandoned the use of the term "regular price."[3]

[3] Petitioner pledged that it would abide by the Commission's "Guides Against Deceptive Pricing" in using the term "Regular Price." The "Guides" are reprinted in Volume 3, CCH Trade Regulation Reporter, at Paragraph 7897.

At hearing, the Commission adduced testimony from several buyers employed by department store competitors of the petitioner, who testified (J.A. 115-140) that they had not advertised the "G.E. Portable Mixer" for as much as $19.95.[4] Testimony of other witnesses introduced by the Commission for the apparent purpose of proving that petitioner's use of the term "mfg. list" was false, misleading and deceptive, demonstrated only that these witnesses did not understand petitioner's use of the term "mfg. list" in its advertisements. (J.A. 141-153)

Petitioner introduced evidence (J.A. 156-171, 219-225) proving that the "G.E. Portable Mixer" had been and was being sold by several of its major competitors at "mfg. list," i.e., $19.95.[5]

The Court of Appeals affirmed the Commission's decision. The final decree (Appendix "B") of that court provides in pertinent part,

> ". . . . that the order to cease and desist [entered by the Commission] be and it hereby is affirmed, and petitioner Giant Food Inc. is hereby commanded forthwith to obey and comply with the terms of said order."

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[4] See Footnote 2: While these witnesses referred to the highest price at which they "sold," cross-examination showed that their testimony was based upon a review of advertising records. No actual sales were introduced by the Commission. Sales checks were not produced for the purpose of cross-examination despite the fact that petitioner asked for a subpoena as part of its cross-examination to obtain them. (J.A. 30-39, 127-130, 207)

[5] Petitioner introduced similar evidence with reference to most of the small electrical appliances listed in Paragraph 4 of the complaint. (J.A. 156-171, 219-225)

REASONS FOR GRANTING WRIT

1. In the present proceeding, both the Commission and the Court of Appeals failed to discharge their duty to issue an order which "at the outset [was], sufficiently clear and precise to avoid raising serious questions as to [its] meaning and application." *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 368, 82 S.Ct. 431, 436 (1962). Under the "generalized language" of the Commission's order, petitioner proceeds at its peril in undertaking promotional programs involving the use of any terms descriptive of price. Practices which are clearly lawful may fall within the prohibitions of the order because the vague uncertain language of the order provides no reasonable standard for determining the "usual and customary" retail selling price in an area such as Metropolitan Washington, which encompasses two fair-trade states (Maryland and Virginia) and one nationally known discount market (Washington, D. C.). The order leaves the critical question of what is (and even what is not) the "usual and customary" retail selling price of items which are fair-traded in Maryland or Virginia and "discounted" in the District of Columbia open to conjecture, surmise, and speculation. Under the order the petitioner cannot, except at the risk of a civil penalty or contempt proceeding, advertise the fair-trade price of any item which is fair-traded in Maryland or Virginia and "discounted" in the District of Columbia because it has no way of knowing whether the fair-trade price is the "usual

and customary" retail selling price in the Washington Metropolitan area.[6]

The Court of Appeals recognized the validity of petitioner's objections to the generalized nature of the order, but suggested that petitioner could resolve any questions concerning its meaning and application "by recourse to the Commission for advice." The court's suggestion offers no solution to the issues raised; to the contrary, it ignores them completely.

Proper judicial administration demands that restraining orders be clear and precise. A restraining order must be written so that the Commission, any District Court, and the Court of Appeals, as well as the petitioner, can understand its terms without reference to anyone for advice. Due process requires this.

The Commission, with the sanction of the Court of Appeals, has been offered the opportunity in this proceeding of suggesting at some later date that its order means what the Commission says it means because the Commission says so. The Court of Appeals should not be allowed to avoid its judicial obligations so simply. It should have modified the Commission's order or returned the proceeding to the Commission for an appropriate order rather than cast petitioner adrift in a sea of uncertainty when the possible

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[6] An explanation in petitioner's advertisement that the item is fair-traded in Maryland or Virginia but discounted in the District of Columbia would not assist petitioner in escaping the prohibitions of the order because "'few if any of the persons who would read [petitioner's] advertisements would take the trouble to, or did, read the fine print disclaimers.'" Opinions of both the *Examiner* and the Commission, at J.A. 53 and 82.

penalties prescribed for violation of Commission orders is so substantial.

The Commission's order is neither clear nor precise. At some later date, a District Court or the Court of Appeals may be called upon, in a civil penalty or a contempt proceeding, to decide issues which Congress has specifically entrusted to the Commission. Without defining the term "usual and customary," the order proscribes petitioner's use of the phrase "mfg. list," or "words of similar import" if the phrase or words refer to a price which is in excess of the "usual and customary" price. The order also bans any other method of "misrepresenting the usual and customary selling price." Only a later evaluation of evidence in a civil penalty or contempt proceeding is apparently sufficient to determine whether any price is in excess of the "usual and customary" price. At that time, a District Court or the Court of Appeals may also be called upon to decide whether some new but now unheard of term constitutes a "word of similar import" or a representation of a "usual and customary" price such as "mfg. list" in this proceeding. The order can only be understood on an after-the-fact, ad hoc basis, and at the risk of substantial penalties. Surely, due process contemplates more than this.

Both the Court of Appeals and the Commission insisted that the term "usual and customary," furnished petitioner a "definite guide." The Court of Appeals noted that other Courts of Appeals had "upheld orders in analogous cases where the words 'usual and customary' were used." In every case to which the Court of Appeals referred, however, the facts showed that the term "usual and customary" made reference to either a "regular price" (in which event

the term was interpreted in the context of the respondent's own past sales), or a preticketed price in an action against a preticketer (in which event the term was interpreted in the context of prices used by persons with whom the preticketer had direct business relations). The decisions in these cases have no application to the present proceeding where the petitioner has little or no knowledge of the prices at which its competitors are selling merchandise. Petitioner has no channel of communication with its competitors regarding pricing and, if it did—as it would have to, to satisfy its responsibilities under the Commission's order—the Commission would certainly accuse it of a conspiracy to fix prices.

The fact is that, in this proceeding, the Commission itself did not prove and did not even attempt to prove the "usual and customary" retail selling prices of the few kitchenwares and small electrical appliances to which it referred in its complaint. The Commission proved only that some of the petitioner's competitors had advertised[7] these kitchenwares and small electrical at less than "mfrs. list." No evidence of specific sales of these items was offered by the Commission at hearing. Rather, the Commission inferred, because three of petitioner's competitors advertised these kitchenwares and small electrical appliances at less than "mfrs. list," that the "usual and customary" retail prices were less than "list."

Thus, without any proof of any sales at less than "list" and without any showing of the size of the market for kitchenwares and small electrical appliances, either in terms of units or dollars, the Commission

[7] See footnote 4.

reached the conclusion that petitioner had misrepresented prices in violation of Section 5 of the Act.[8] The Commission rationalized its decision by stating that it had a right to insist "upon a form of advertising clear enough so that, . . . wayfaring men though they be fools shall not err therein."

Petitioner submits that, if its advertising is to be tested by the rigorous standard of the words of the Prophet Isaiah, it has a right to insist in turn that Commission orders proscribing such practices satisfy the same test.

2. The order entered by the Commission ranges far beyond the "violation[s] . . . charged in [the] complaint," and imposes a new dimension of vicarious liability for "pretic keting" by independent third parties whose practices petitioner does not, and cannot, control. The order is not "tailored," as this Court has repeatedly said Commission orders must be, to "meet the legitimate needs of the case," and "strictly to cope with the threat of future violations identical with or like or related to the violations" which petitioner was "found to have committed." *Federal Trade Commission* v. *Henry Broch & Co., supra.* See also, *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130, 83 S.Ct. 217, 226 (1962); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167, 83 S.Ct. 239, 245 (1962); *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435-436, 61 S.Ct. 693, 699 (1941).

Despite the fact that the allegations in the complaint and the proof in the record were limited to petitioner's

[8] Petitioner introduced evidence of actual sales at "list" by its competitors. The Commission ignored this evidence completely. Its opinion makes no mention of this evidence.

use of the terms "regular price" and "mfg. list," in newspaper advertising of kitchenwares and small electrical appliances, the order is not limited to the specific practices described in the complaint or demonstrated by the record or even like or related practices. Rather, the broad terms of the order proscribe any use of any term descriptive of price, including but not limited to the terms "regular price" and "mfg. list," in any manner, including but not limited to newspaper advertising, and in respect to any product, including but not limited to kitchenwares and small electrical appliances, unless the descriptive term refers to either the petitioner's own regular price or the "usual and customary" price in the trade area.[9]

The vice of the Commission's order is that it does too much. Clearly, it restrains the practices "charged in [the] complaint" which petitioner was "found to have committed" but in the process it also reaches and prohibits other practices which are not inherently unlawful, and which are well beyond the ambit of the activities which were the subject of the complaint and the record.

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[9] In addition to proscribing the "use" of the terms "regular price" and "mfg. list," or "words of similar import," the order broadly proscribes:

(1) ". . . otherwise misrepresenting the [petitioner's] usual and customary retail selling price . . .;

(2) ". . . otherwise misrepresenting the usual and customary retail selling price or prices . . . in the trade area;

(3) "Representing in any manner that . . . customers are afforded savings amounting to the difference between [petitioner's] stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and regularly sold by [petitioner] at retail in the recent regular course of its business."

The complaint in this proceeding, for example, did not charge petitioner with the unlawful display and sale of "preticketed" merchandise. Indeed, respective counsel for the Commission and for petitioner stipulated on the record that the complaint and record were not concerned with "preticketing."[10] Nevertheless, the literal terms of the Commission's order cover the display and sale of preticketed merchandise.[11]

The devastating impact of the Commission's order is apparent. Whenever it offers a preticketed item for sale, petitioner, risking a possible civil penalty or con-

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[10] The stipulation between counsel appears at 683-4 in the transcript and reads as follows:

> "It is stipulated by and between counsel that the manufacturer's list prices referred to in paragraph 4 of the complaint are in fact the list prices or suggested list prices which were furnished to the respondents by the manufacturers of the various products listed in the aforementioned paragraph.
>
> "It is also stipulated for purposes of this record only that none of the items mentioned in paragraph 4 were preticketed by the respective manufacturers."

[11] See footnote 9, supra, for the pertinent parts of the order; and see the Commission's proposed Guides Against Deceptive Pricing, in which the Commission states:

> "Both those who preticket merchandise that is to be sold to consumers by others and those who distribute the merchandise preticketed, as well as those who actually offer the articles for sale, are responsible if the price figures do not meet the standard set forth in this Guide. . . .
>
> "Example: A manufacturer . . . pretickets his products with his latest marked 'Price 12.95.' Although this price prevails in some areas, in others the [product] generally sells for $10.95. The preticketed price would be deceptive in any trade area where the $12.95 price is not the generally prevailing price; and the manufacturer, wholesaler, or distributor, and retailer would each be responsible for contributing to such deception." 29 Federal Register 178 (1963).

tempt proceeding,[12] must first determine and redetermine on a continuing basis whether the preticketed price is in excess of the "usual and customary" price in the trade area. If it is, petitioner is then faced with the unenviable choice of either obliterating the preticketed price, or where this is impossible, repackaging the merchandise; or, finally, where neither choice is economically feasible, discontinuing the sale of preticketed merchandise.[13] What the order does can be understood only in light of the vast number of items that are distributed on a preticketed basis.

Manufacturers of thousands of items constituting a substantial share of the merchandise which petitioner offers for sale print a suggested price directly on the container or wrapper in which they package their

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[12] In view of the fact that the order of the Court of Appeals "commands" petitioner "to obey and comply" with the terms of the Commission's order, petitioner is subject not only to the civil penalty provisions of Section 16 of the Federal Trade Commission Act, 15 U.S.C. 56, but also to a contempt proceeding in the Court of Appeals. Parenthetically, it is to be noted that there might be divers interpretations of the Commission's order, depending upon whether the Commission proceeded through the Justice Department in the District Court on a civil penalty basis or, itself, proceeded directly in a contempt proceeding in the Court of Appeals.

[13] Petitioner cannot even avoid the force of the Commission's order by selling preticketed merchandise at the preticketed price because the Commission takes the view that the manufacturer's preticketed price constitutes a representation of the usual and customary price in the trade area, and not a representation of petitioner's own usual and customary price. It follows, therefore, that by selling at the preticketed price, petitioner would simply be representing falsely, again, in the Commission's view, that it was selling the item for the price at which the item was usually and customarily sold in the trade area. Only if all the petitioner's competitors sold at the preticketed price could petitioner avoid the proscription of the order.

merchandise.[14] Typical examples of merchandise distributed on a preticketed basis range from the proverbial needle and mousetrap to automobiles[15] and include razor blades, tooth paste, shampoos, first aid material, cookies, potato chips, shoe polish, plastic adhesive tapes, crayons, coloring books, magazines, books, records, and a vast array of items which are fair-traded.[16] A more complete, but only partial, list of preticketed merchandise sold by petitioner is set forth in Appendix "D." Petitioner prices and sells the bulk of these preticketed items at less than the preticketed price. Many, but not all, of petitioner's competitors also sell at less than the preticketed price. Petitioner's offers and sales of preticketed products may, therefore, violate the literal, if not specific, terms of the Commission's order inasmuch as the preticketed prices may not be the "usual and customary" retail prices in the trade area. Customers, in terms of the Commission's

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[14] In some instances, preticketed price on a container can be covered up or removed, but in other and numerous instances, the printed price cannot be covered up or removed and the only way that the price can be removed from the public view is by repackaging.

[15] Though petitioner does not sell automobiles, automobiles must be preticketed by law. 15 USC 1231. Petitioner has consistently contended that the use of manufacturer's list price does not constitute a violation of Section 5 of the Act. If it does, then Congress legislated an "unfair method of competition" for the automobile industry in enacting the Automobile Information Disclosure Act.

[16] Maryland and Virginia, where petitioner operates some of its stores, have Fair Trade Laws. The District of Columbia, in which petitioner also operates many stores, has no Fair Trade Laws. The advertising which was the subject of the Commission's complaint was published in the Washington Post and Washington Star which are circulated in Maryland, Virginia and the District of Columbia.

order, may not be "afforded savings amounting to the difference between [petitioner's] stated selling price and [the preticketed price] used for comparison. . . ."

The practice of offering and selling preticketed merchandise does not involve, as the practices referred to in the complaint and record did involve, affirmative price representations in newspaper advertising of wide circulation. All that is involved in the offer and sale of preticketed merchandise is the display at point of sale, of items which a manufacturer has packaged in a wrapper on which the manufacturer has printed a price. Precisely because of the characteristic differences between the practices referred to in the complaint and the practice of merely offering and selling preticketed merchandise, counsel for both the Commission and the petitioner stipulated that the proceeding was not concerned with preticketing.[17]

If the petitioner had advertised preticketed items in newspapers having wide distribution and represented a preticketed price which was in excess of the "usual and customary" price in the trade area, there would be reason, and a basis in the record, for including this practice within the purview of the order. No such showing was made. There is, therefore, no basis in the record for including this practice within the literal terms of the order. And, there are compelling reasons why preticketing should be excluded from the range of the order. Petitioner has no control over the

[17] The stipulation is quoted in footnote 10. The stipulation was made to make it clear that the case did not fall within the ambit of such cases as *Baltimore Luggage* v. *Federal Trade Commission*, 296 F. 2d 608 (CA 4, 1961), which involved "preticketing," and *In the Matter of Filderman Corporation*, Docket No. 7572 (1959) which involved the use of false list prices.

advertising and packaging practices of its suppliers. Like its competitors, petitioner merely buys and sells merchandise which its suppliers offer for sale. Unlike its competitors, however, petitioner will be faced with serious administrative problems and potential financial damage, civil penalty and contempt proceedings aside, if the Commission's present order is enforced.

The order should not be allowed to stand. On the basis of a proceeding in which the Commission started out to stop allegedly unlawful and deceptive practices by the petitioner, the Commission has ended up by attacking practices of petitioner's suppliers. The unfortunate fact is that, in its effort to exercise two specific practices, allegedly deceptive, the Commission has designed an order which may halt the flow of the very commerce which the Commission is charged with protecting. The remedy may cure the evil which the Commission sought to eliminate, but it will certainly cripple, if not kill, the patient in the process.

3. The issues raised by the petition present questions of paramount importance in the administration and enforcement of the Federal Trade Commission Act. If the Commission's order is allowed to stand, retailers throughout the nation, and particularly those in the Washington Metropolitan area, may be confronted with the prospect of a "boilerplate" order by the Commission prohibiting divers methods of legitimate and lawful advertising, if they sell any pretiketed merchandise in an area where pretiketing manufacturers do not either maintain and enforce fair trade or are not permitted to enforce fair trade. This petition is, in a realistic sense, a request for a final determination of the issue presented for the benefit of a vast class of persons throughout the country.

Mindful of the admonition of this Court in *Federal Trade Commission* v. *Henry Broch & Co.*, supra, several Courts of Appeals, unlike the Court of Appeals for the District of Columbia Circuit in this proceeding, have carefully circumscribed the scope of Commission orders. The Second Circuit Court of Appeals in two recent decisions modified and limited Commission orders entered under Section 5 of the Act to the "specific practices involved" in the proceedings. *Grand Union* v. *Federal Trade Commission*, 300 F.2d 92 (C.A. 2, 1962), cert. den'd. 371 U.S. 824, 83 S.Ct. 44 (1962). The First Circuit Court of Appeals has also indicated its displeasure with the breadth of Commission orders in the course of setting aside orders in proceedings which it returned to the Commission for further findings. *Korber Hats Inc.* v. *Federal Trade Commission*, 311 F.2d 358 (C.A. 1, 1962); *Colgate-Palmolive-Peit Co.* v. *Federal Trade Commission*, 310 F.2d 89 (C.A. 1, 1962). And even before *Broch*, supra, the Fourth Circuit Court of Appeals understood the danger of expansive orders which went beyond the practices charged by the Commission in its complaints. *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 294 F.2d 619, 628-629 (C.A. 4, 1961). Orderly administration and enforcement of the Act requires a uniform and consistent application of provisions of the Act to everyone who is faced with a Commission complaint. Surely, retailers, such as petitioners, who engage in business in the District of Columbia, should not be made subject to more stringent orders and exposed to greater penalties than those who do business in either the First Second or Fourth Circuits.

The Commission on three different occasions has published guides against deceptive pricing practices for

the asserted purpose of serving as "practical aids to the honest businessman who seeks to conform his conduct" to the requirements of the Act. These guides are not only internally inconsistent but conflict directly with one another. In its most recent set of guides, published on January 8, 1964, the Commission completely dropped the standard of the "usual and customary" price (which is the touchstone of its order against petitioner) for a new standard which has yet to be defined. The "new guides" prompted Commissioner MacIntyre to issue a statement stating:

> "The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of the law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. . . ."

The "new guides" emphasize the necessity for a review of the order. On the one hand, the order subjects the petitioner to one standard of conduct (the "usual and customary"); all of petitioner's competitors however, are free to adhere to another standard, which remains to be defined but which appears to be less rigorous.

CONCLUSION

"The severity of possible penalties . . . for violations of [Commission] orders underlies the necessity" for an order which gives petitioner ample notice of the acts and practices will subject it to the penalties which the Act prescribes. A Commission order, no less than

a criminal statute, should be "clear and precise" so as not to raise "serious questions as to [its] meaning and application." Criminal statutes which are so vague that they leave the standard of guilt to the "varient views of the different courts and juries which may be called upon to enforce" them deny due process. *United States* v. *Cohen Grocery Co.*, 264 F. 218, 220 (E.D. Mo., 1920); aff'd. 255 U.S. 81, 41 S. Ct. 298 (1921). Statutes which are "so vague and indefinite, in form and as interpreted," as to fail "to give fair notice of what acts will be punished," transgress "an accused's rights under procedural due-process." A penal statute must set up "ascertainable standards of guilt" so that "men of common intelligence" are not "required to guess at" its "meaning." *Winters* v. *New York*, 333 U.S. 507, 509-510, 515, 68 S. Ct. 665, 667 (1948). The Commission's order, which is no less penal than a criminal statute, fails to give petitioner fair notice of the practices which it prohibits, and thereby denies petitioner due process.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Paul Rand Dixon, Chairman, Sigurd Anderson, William C. Kern, Philip Elman, Everette MacIntyre

Docket No. 7773

In the Matter of
GIANT FOOD, INC., a corporation.

Final Order*

IT IS ORDERED that respondent Giant Food, Inc., a Delaware corporation, and its officers, directors, agent, representatives, and employees, directly or through any cor-

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* NOTE—This order is issued subject to Section 4.22(e) of the Commission's Rules of Practice, which provides as follows:

> In any case where the Commission's decision contemplates the entry of an order against a respondent broader in its prohibitions than those, if any, contained in the initial decision, or where the Commission's decision differs from the initial decision in any substantial respect affecting the scope or content of the order which should properly be entered, the Commission will cause a copy of its decision, together with a proposed form of order, to be served upon all parties. Within twenty days after service upon it of the Commission's decision and proposed order, the respondent may file with the Commission its exceptions to any of the provisions of the proposed order, a statement of its reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision. If no exceptions to the Commission's proposed order are filed within twenty days, such proposed order shall become the final order of the Commission. If exceptions to the proposed order are filed by the respondent, counsel supporting the complaint may within ten days after service of such exceptions upon him file a statement in reply thereto, supporting the proposed order. The Commission will thereafter enter its final order.

porate or other device, in connection with the offering for sale, sale, and distribution of household electrical appliances, kitchen utensils, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Using the words "regular price," or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been usually and regularly sold by the respondent at retail in the recent, regular course of its business; or otherwise misrepresenting the respondent's usual and customary retail selling price of such merchandise;

(2) Using the words "manufacturer's list price," "suggested list price," "factory suggested retail price," or words of similar import, to refer to any amount which is in excess of the price or prices at which such merchandise is usually and customarily sold in the trade area where the representation is made; or otherwise misrepresenting the usual and customary retail selling price or prices of such merchandise in the trade area;

(3) Representing in any manner that, by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of its business.

IT IS FURTHER ORDERED that respondent Giant Food, Inc., shall, within sixty (60) days after service upon it of this

order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioners Anderson and Kern concurring in the result.

(SEAL)

JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

Issued: June 13, 1962

APPENDIX "B"

Filed Oct. 14, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,269

GIANT FOOD INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Final Decree Affirming and Enforcing Order to Cease and Desist

Giant Food Inc., having filed in this Court on September 12, 1962, a petition to review and set aside an order to cease and desist issued by the Federal Trade Commission on July 31, 1962, in a proceeding before it entitled "In The Matter of Giant Food Inc., a corporation, Docket No. 7773"; and the matter having been submitted to the Court on briefs and oral argument, and the Court having fully considered the cause and having on June 13, 1963, rendered its opinion and entered its judgment affirming the order before the Court for review, and directing the enforcement of the order of the Federal Trade Commission;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside the order of the Federal Trade Commission is hereby denied;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the order to cease and desist be and it hereby is affirmed, and petitioner Giant Food Inc. is hereby commanded forthwith to obey and comply with the terms of said order.

By the Court:

/s/ CHARLES FAHY
/s/ WALTER M. BASTIAN
/s/ CARL MCGOWAN
Circuit Judges

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,269

GIANT FOOD INC., *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Petition to Review an Order of the
Federal Trade Commission

Decided June 13, 1963

Mr. Robert F. Rolnick, with whom *Messrs. Raymond R. Dickey* and *Bernard Gordon* were on the brief, for petitioner.

Mr. Richard Whittington Whitlock, Attorney, Federal Trade Commission, with whom *Mr. James McI. Henderson*, General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before FAHY, BASTIAN and MCGOWAN, Circuit Judges.

MCGOWAN, *Circuit Judge*: This is a petition to review a Federal Trade Commission cease and desist order against allegedly false and deceptive advertising in violation of § 5 of the Federal Trade Commission Act: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared un-

lawful."[1] Petitioner was ordered to cease and desist from referring to "regular price," unless petitioner had usually and regularly sold the particular product at that price "in the recent, regular course of its business;" and from referring to the "manufacturer's price," when that list price was not the usual and customary retail selling price of the product in the area.[2]

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[1] 66 Stat. 632, 15 U.S.C. § 45(a)(1). The Commission is "empowered and directed," in pertinent part, "to prevent persons, partnerships, or corporations, except . . . as they are subject to the Packers and Stockyards Act, 1921, . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 66 Stat. 632, 15 U.S.C. § 45 (a)(6). The petition to review lies under 38 Stat. 719, as amended, 15 U.S.C. § 45 (c) and (d).

[2] The Commission ordered Giant to cease and desist from:

"(1) Using the words 'regular price,' or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been usually and regularly sold by the respondent at retail in the recent, regular course of its business; or otherwise misrepresenting the respondent's usual and customary retail selling price of such merchandise;

"(2) Using the words 'manufacturer's list price,' 'suggested list price,' 'factory suggested retail price,' or words of similar import, to refer to any amount which is in excess of the price or prices at which such merchandise is usually and customarily sold in the trade area where the representation is made; or otherwise misrepresenting the usual and customary retail selling price or prices of such merchandise in the trade area;

"(3) Representing in any manner that, by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of its business."

The major issues presented by this petition are: (1) the power of the Commission to proscribe the use of "manufacturer's list price" as a deceptive advertising practice; (2) the fairnes of the administrative hearing afforded to petitioner; (3) the sufficiency of the evidence to support the Commission's order; and (4) the scope of the cease and desist order.[3]

I

Giant Food Inc., a Delaware corporation, operates a chain of more than fifty retail stores in Maryland, Virginia and the District of Columbia, located primarily in the Washington Metropolitan Area. Most of the outlets are "Giant Food" Stores; some are designated "Super-Giant." A "Super Giant" combines all of the attributes of a supermarket and department store. It sells food, food products, and non-food products which would normally be found in a large chain grocery; small durable consumer goods, such as housewares and electrical appliances; durable goods; and soft goods, including clothing, drugs and soaps.

In the conduct of its business, and for the purpose of inducing the public to purchase goods at its stores, Giant regularly advertises in the three major newspapers serving the Washington Metropolitan Area. Typical of the "ads" placed by Giant were the following:

"Proctor Steam & Dry Iron #10010 Reg. Price $15.95. Adv. Price $8.47."

"Regina Twin Brush Waxer #400 Reg. Price $66.00. Adv. Price $35.47."

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[3] Giant challenges the jurisdiction of the Commission on the ground that it is a "packer," within the meaning of the Packers and Stockyards Act of 1921 (42 Stat. 160, 7 U.S.C. § 191), and thus exempt from § 5. This contention has previously been made to this Court, and rejected by it. *Giant Food Inc.* v. *F. T. C.*, 113 U.S. App. D.C. 227, 307 F. 2d 184 (1962), *cert. denied*, 372 U.S. 910 (1963).

"Regina Twin Brush Waxer $35.47-Mfg. List $66.00."

"Sunbeam Mixmaster $24.88-Manufacturer List Price $37.95."

On February 4, 1960, the Commission issued a complaint against Giant based on this type of advertising as used in promoting the sale of small household appliances. The complaint charged that "Reg. Price," and variants thereof, represented that Giant had sold the particular product at such price "in the recent, regular course of its business," and that such representation was untrue. The complaint also charged that "Mfr. List," and variants thereof, represented that the particular product was "usually and customarily sold at retail" at such price, when in fact the represented price was "substantially in excess of" the usual and customary retail price.

Hearings were held during 1960-61. Concerning the charge of misuse of "regular price," and similar terms, an employee of Giant admitted that his company's stores had never sold the items at that price. It appeared, however, that Giant had ceased using the term soon after the Commission began investigating Giant in 1959, in accordance with a directive issued by the company to its employees not to refer to the regular price of a product unless Giant had in the recent past sold the product at that price. Giant does not now contest the finding by the Hearing Examiner, adopted by the Commission, that reference to regular prices was deceptive advertising amounting to unfair competition within the proscription of § 5.[4]

[4] See *Niresk Industries, Inc.* v. *F.T.C.*, 278 F. 2d 337 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960), and *Bankers Securities Corp.* v. *F.T.C.*, 297 F. 2d 403 (3d Cir. 1961), both enforcing orders to cease and desist using "regular price" and similar terms on the ground that the terms implied that the company involved had sold the product at that price. In the *Bankers Securities* case, the company unsuccessfully argued that the terms actually referred to prices charged by other stores in the area. The Commission ascribes the latter definition to "manufacturer's list price" in the instant case.

As to this portion of the order, Giant challenges only the propriety of banning practices which it had stopped and which it had promised the Commission not to reinstitute.

As to "manufacturer's list price," and similar terms, Giant had neither ceased their use nor voluntarily consented to do so. The Commission called as its witnesses buyers for The Hecht Company, S. Kann Sons Company, and Woodward & Lothrop, Inc., three of the larger department stores serving the Washington Metropolitan Area. The buyers testified that their stores had never sold at list price the products which Giant advertised with the comparison of its selling price to the list price. Taking just one example, Giant advertised the Sunbeam Hand Mixer, with a list price of $21.00, for $13.97. The highest prices at which the other stores sold the same product at that time were $16.49 (Hecht), $14.97 (S. Kann), and $13.49 (Woodward & Lothrop). Additionally, the Commission produced the testimony of several consumer witnesses, all of whom testified that they understood Giant's advertising to mean that the manufacturer's list price was the price they would pay if they purchased the product elsewhere, and that, by buying at Giant, they would realize a "saving" of the defferenee between list price and Giant's price.

In rebuttal, Giant showed that the catalogue of the Goodyear Service Stores, which operated several stores in the Metropolitan Area, advertised at least some of the same products at prices the same as the manufacturer's list prices to which Giant referred in its advertising; that manufacturers advertised their products at suggested list prices in Life Magazine, McCalls, Look Magazine, and Consumer Reports Buying Guide; and that several purchases had been made by agents of Giant in stores in the Metropolitan Area at the manufacturer's list price for the item. On this record the Trial Examiner issued the cease and desist order which, with certain modifications

in language by the Commission, is the subject of this appeal.

II

Giant's first major contention is that the Commission exceeded its authority by defining "manufacturer's list price" as the usual and customary retail price in the trade area where the term is used, and that the term is neither "false, misleading, nor deceptive." We do not understand the Commission to hold that use of the term "manufacturer's list price" is unlawful *per se*; rather, it is unlawful only if it is not the usual and customary retail price in the area. The use of price lists and suggested retail prices is not confined to any one industry. Although not of recent origin, it could be justifiably called a modern phenomenon of large-scale merchandising.[5] It has been used as a means of effecting unlawful resale price maintenance;[6] but it has also been justified as a means of enabling consumers to identify products and compare actual retail prices of the same products.[7] Indeed, Giant urges the latter justification in the instant case. A suggested retail price may perhaps serve as an identifying factor for comparison purposes. But, if the "advertisements . . . are capable of two meanings, one of which is false, [they] are misleading."[8] Thus, if the Commission was correct that

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[5] See Alexander, *Honesty and Competition: Some Problems in the Pricing of Goods*, 31 Fordham L. Rev. 141 (1962); Murphy, *The Ethics of Retail Price Advertising*, 6 Antitrust Bull. 419 (1961); and *Comment*, 39 Texas L. Rev. 903 (1961).

[6] See, *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), and *F.T.C.* v. *Beech Nut Packing Co.*, 257 U.S. 441 (1922).

[7] See Alexander, *supra* note 5; Murphy, *supra* note 5.

[8] *Rhodes Pharmacal Co.* v. *F.T.C.*, 208 F. 2d 382, 387 (7th Cir. 1954), *rev'd in part*, 348 U.S. 940 (1955). The court of appeals had modified the order of the Commission. The Supreme Court vacated the modification and affirmed the order as issued by the Commission.

Giant's use of "manufacturer's list price" was false and deceptive, then the order must be upheld, even though the term might have performed a different—and lawful—function.

There can be no doubt at this late date that advertising which is false or deceptive is within the proscription of § 5.[9] As noted above, two other courts of appeals have previously upheld Commission orders against the use of "regular price" unless the company had itself sold the product at that price.[10] Similarly, orders have been upheld against manufacturers, prohibiting pre-ticketing of products unless the product is "usually and regularly sold at retail" at the pre-ticketed price in trade areas where the representation is made.[11] The Commission here has

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[9] See, *e.g.*, *F.T.C.* v. *Standard Education Soc'y*, 302 U.S. 112 (1937); *Helbros Watch Co.* v. *F.T.C.*, —— U.S. App. D.C. ——, 310 F. 2d 868 (1962), *cert. denied*, 372 U.S. 976 (1963); *Niresk Industries, Inc.* v. *F.T.C.*, *supra*; and *Kalwajtys* v. *F.T.C.*, 237 F. 2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957).

[10] *Niresk Industries, Inc.* v. *F.T.C.*, *supra*, and *Bankers Securities Corp.* v. *F.T.C.*, *supra*. Compare *L. & C. Mayers Co.* v. *F.T.C.*, 97 F. 2d 365 (2d Cir. 1938), upholding an order which prohibited the company from falsely representing itself as a "wholesaler" of jewelry, when the alleged wholesale prices were in fact higher than normal wholesale prices.

[11] *Helbros Watch Co.* v. *F.T.C.*, *supra*: "Fictitious pricing in the form of false 'pre-ticketing' is the now widespread practice, particularly among, but by no means limited to, manufacturers, of representing, usually on the package or the article itself, a retail price substantially higher than the actual price to the consumer. Its vice is its deception and the understandable inability of the price-conscious consumer to control his urge to make a 'good buy.'" See further, *Baltimore Luggage Co.* v. *F.T.C.*, 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962); *Clinton Watch Co.* v. *F.T.C.*, 291 F. 2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); *Rayex Corp.* v. *F.T.C.*, —— F. 2d —— (2d Cir., #27583, decided May 7, 1963), slip opinion: "We are in complete agreement with the Commission and the other Circuits that this apparently prevalent practice is not to be condoned and that such deception of the buying public should be eliminated."

determined that the use of the term "manufacturer's list price" represents to the public that that was the price at which the product was usually and customarily sold by other stores in the area. This determination was within its power, unless it was "arbitrary or clearly wrong."[12] We cannot say that it was, particularly in view of the consumers' testimony adduced at the hearing. If a manufacturer can be prevented from placing a deceptive price on its product, we see no reason to permit a retailer to make reference to a deceptive suggested price. It is immaterial that all potential buyers are not included in that class of persons who would be cajoled by Giant's use of the term. The Act was not intended to protect "sophisticates."[13]

Two other contentions of petitioner can be disposed of here. Giant urges that the policy behind the Automobile Information Disclosure Act,[14] which requires automobile dealers to disclose the manufacturer's suggested retail de-

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[12] "The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission and should be upheld by a reviewing Court unless arbitrary or clearly wrong." *Kalwajtys* v. *F.T.C.*, *supra*, at page 656; see also *A.P.W. Paper Co.* v. *F.T.C.*, 149 F. 2d 424 (2d Cir. 1945), *aff'd*, 328 U.S. 193 (1946); *Gulf Oil Corp.* v. *F.T.C.*, 150 F. 2d 106 (5th Cir. 1945).

[13] "Fictitious prices are illegal even though it is obvious to the sophisticated that the price tag is only a come-on. 'The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.'" *Helbros Watch Co.* v. *F.T.C.*, *supra*. See *F.T.C.* v. *Standard Education Soc'y*, *supra*; *F.T.C.* v. *Sterling Drug, Inc.*, —— F. 2d ——, (2d Cir., #28118, decided May 6, 1963), slip opinion; *General Motors Corp.* v. *F.T.C.*, 114 F. 2d 33 (2d Cir. 1940), *cert. denied*, 312 U. S. 682 (1941).

[14] 72 Stat. 325; 15 U.S.C. 1231.

livery price to customers, prevents the imposition of a contrary policy where small appliances are involved. We agree with the disposition made of a similar contention by the Fourth Circuit in *Baltimore Luggage Co.* v. *F.T.C.*, *supra*, where the court reviewed the legislative history of the Act and held:

> "It is quite obvious that the Automobile Information Disclosure Act was enacted in the effort to remedy a situation peculiar to the automobile industry brought about by widespread fraudulent or deceptive practices principally indulged in by retailers. The Act does indicate that preticketing *per se* is not illegal, but the Commission does not so contend. There is nothing in this Act to indicate that fictitious or deceptive preticketing has Congressional approval." (296 F.2d at 612)

Although this holding was in the context of a proceeding directed against a manufacturer for deceptive pre-ticketing, we believe it to be equally relevant in the circumstances of a challenged use by a retailer of deceptive references to manufacturer's list price. No contention of *per se* illegality is advanced in this case.

Nor can we agree with Giant that the Commission is "administratively estopped" from restricting the deceptive use of "manufacturer's list price" by virtue of a prior decision, *In the Matter of Filderman Corporation*, F.T.C. Docket No. 7572, December 30, 1959. The Commission ordered Filderman to cease advertising prices as "manufacturer's list prices" when the advertised prices were actually in excess of the list prices. The order permitted the use of correct list prices, but it cannot be head as authorizing their use in a deceptive or misleading manner, which is what is challenged here. Thus, the factual situation is significantly different. Nor can Giant claim that it relied to its detriment on the action in *Filderman*, since

Giant was using the term in its advertising prior to the Commission's decision in that case. Finally, an administrative agency is not "bound . . . to deal with all cases at all times as it has dealt with some that seem comparable."[15]

III

Thus, if the Commission's finding that the manufacturer's list price used by Giant was not the usual and customary retail price in the Washington Metropolitan Area is supported by substantial evidence on the record viewed as a whole, the order must be upheld.[16] Disposition of this issue also requires consideration of Giant's contention that it did not receive a fair hearing.

The evidence on which the Commission based its finding that the represented price was not the usual and customary retail price consisted of the testimony of the buyers from the large area department stores. It will be recalled that these witnesses testified that their respective stores had never sold the products at list price. Each testified on the basis of notes which had been taken while reviewing their stores' records. At the close of direct examination of the first witness, counsel for Giant requested that he be allowed to reserve the right to cross-examine until he could make further investigation into the testimony on direct. This request was denied. Counsel then proceeded to cross-examine, and, upon learning that the testimony was from notes taken in connection with an examination of the company records, requested subpoenas *duces tecum* to issue for production of the records themselves. This request was also denied, as were similar requests in the case of each of the buyer-witnesses; and Giant took an

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[15] *F.C.C.* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946). See 2 Davis, *Administrative Law* § 17.07 (1958). It might be noted that the Commission has now issued another complaint against *Filderman* dealing with the issue as raised in this case.

[16] 5 U.S.C. § 1009(e); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474 (1951); *Helbros Watch Co.* v. *F.T.C.*, *supra*.

interlocutory appeal to the Commission from the denials. When the examiner denied a motion for a continuance pending the outcome of the appeal, Giant's counsel began presenting its case in defense. Subsequently, before Giant completed its case, the Commission reversed the examiner's denial of subpoenas, which were then issued to the three stores and the records sought brought before the examiner.[17]

At this point, upon further hearings, counsel for Giant refused to take the return of the subpoenas and to examine the witnesses on the basis of the records which had been brought in. The reason assigned was that the examiner had previously ruled cross-examination closed, and counsel argued that, if he were to proceed to examine the witnesses, they would be his witnesses and he would be bound by their testimony. The examiner repeatedly assured counsel that examination could proceed without regard to form and that leading questions could be asked. He also stated, as phrased by the Commission, "that there was no basis for counsel's concern that he would be 'bound' by what the witnesses said if he called them as his own, since the case was being tried not before a jury but before an examiner whose sole interest was in an objective appraisal of the value of their testimony." Counsel, however, persisted in his refusal to go further.

Giant then moved to have the testimony of the buyer-witnesses stricken from the record because of an inadequate opportunity to cross-examine them. This motion was denied, and the hearings ended. The Commission

[17] There was further objection by Giant when the examiner, on motion by counsel representing the three department stores, limited the reach of the subpoenas. To avoid unnecessary complication of this opinion, we merely note that the scope of the subpoenas was properly limited to information relating to the prices at which the products were sold, which was testified to on direct examination. Cost and quantity data sought by Giant were unnecessary for cross-examination of the witnesses.

subsequently held that the examiner was correct in denying the motion to strike the testimony.

Giant had, of course, the right to cross-examine the witnesses concerning their testimony on direct examination. As indicated, counsel did cross-examine four of the five buyer-witnesses concerning the knowledge of each witness as to the material facts on which the testimony was based, albeit without the benefit of records which might well have proved to be of material aid. There can be no doubt that Giant was entitled to see the relevant records on which the testimony was based; and we can assume that accepted rules of evidence would require their production at a time when cross-examination is available.

However, as the Supreme Court has said, ". . . administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence."[18] This is not to say that such an agency can ignore *all* rules, but only that some leeway shall be afforded. It cannot, for example, refuse to permit any cross-examination or unduly limit it.[19] Because the Commission "is, at once, the accuser, the prosecutor, the judge and the jury,"[20] it must remain alert to observe accepted standards of fairness. Reviewing courts must, therefore, be alert to ascertain that the true substance of a fair hearing is not denied to a party, bearing in mind that the inordinate delay common in administrative hearings of the sort now before us is a legitimate cause of public concern.

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[18] *F.T.C. v. Cement Institute*, 333 U.S. 683, 705-06 (1948).

[19] See § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 1006(c): "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts;" 2 Davis, *Administrative Law* § 14.15; *Dolcin Corp. v. F.T.C.*, 94 U.S. App. D.C. 247, 219 F. 2d 742 (1954), *cert. denied*, 348 U.S. 981 (1955).

[20] *Niresk Industries, Inc. v. F.T.C.*, *supra*, at 341.

Here, the examiner refused to continue the hearings until the full Commission had an opportunity to act on the appeal. When, however, the subpoenas subsequently issued, he was willing to afford Giant all of the benfits of cross-examination, though hesitating to apply the name. The pertinent records were produced, and counsel was told that he could recall the witnesses, ask leading or any other type of questions, and not be concerned with being "bound" by their testimony. We share the Commission's bewilderment as to why the examiner "balked at using the label 'cross-examination' to describe the procedure he was allowing [Giant] to follow, when he was in fact withholding from it none of the substance of the right of cross-examination. But it is far more difficult to see why [Giant] refused to conduct such examination when the opportunity to do so was made available to it in all except name." Accordingly, Giant's contention that the buyers' testimony was not properly a part of the record fails.

It appears to be true, as Giant claims, that the testimony in question was the only evidence proffered by the Commission to show that the manufacturer's list price was not the usual and customary retail price in the area. Had this evidence failed, the Commission's case would have failed along with it. For the use of manufacturer's list price is not illegal *per se*; rather, it is false and deceptive only if the price is not adhered to by area retailers. The latter must be shown by substantial evidence before the use of the term will be illegal.[21]

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[21] See *Rayex Corp.* v. *F.T.C.*, *supra*, where, in reference to the practice of false preticketing by a manufacturer, the court stated:

"We are in complete agreement with the Commission and the other Circuits that this apparently prevalent practice is not to be condoned and that such deception of the buying public should be eliminated. The Commission nevertheless is still required to prove by substantial evidence that preticketing is being used in a proscribed manner by the particular respondent involved in any case."

Thus, we reach the question of whether there is substantial evidence on the whole record to support the Commission's finding that Giant's use of the term was false and deceptive. We hold that there is. It is the function of the Commission to pass upon the weight to be accorded to the evidence before it; and to make the choice, if necessary, between varying inferences which might be drawn therefrom. The possibility of drawing either of two inconsistent inferences from the evidence does not prevent the Commission from drawing one of them.[22] Courts, however, do not always agree with the Commission that an order is supported by substantial evidence. A case in point is *Rayex Corp.* v. *F.T.C.*, *supra*, recently decided by the Court of Appeals for the Second Circuit, where enforcement was denied of an order charging false and deceptive pre-ticketing by a manufacturer of sunglasses. The evidence adduced by the Commission that the pre-ticketed price was not the "usual and customary" retail price in the area consisted of testimony by a wholesaler that he "estimated" that only 25% of the area sales were at the pre-ticketed price; evidence of only one purchase made at a price below the pre-ticketed price; and an inconclusive statement by the president of *Rayex* that "we have labels that say $1.98 and we have labels which sell for $19.95."

The paucity of the record before the Second Circuit does not resemble the Commission's case against Giant. Here, there was testimony that three of the larger department store chains serving the Washington Metropolitan Area had not sold the products in question at or above the suggested list price, at least within the preceding two

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[22] Concerning the powers of the Commission, see *Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 726 (1945); *Northern Feather Works* v. *F.T.C.*, 234 F. 2d 335 (3d Cir. 1956); *Bockenstette* v. *F.T.C.*, 134 F. 2d 369 (10th Cir. 1943).

years. This testimony went uncontradicted.[23] Giant argues, however, that the Commission ignored the evidence that some area stores sold the products at list price. We can neither say that this evidence was ignored, nor that it belies the existence of substantial evidence to support the order. We agree with the statement in *Rayex* that "one or two isolated sales at less than the preticketed price is as equally probative of a valid 'sale' on the part of the dealer involved as it is of a deceptive practice." We hold, however, that evidence that the larger area retailers had not sold at the list price is sufficient to show that list price was not the "usual and customary" retail price in the area. The Commission did not have to prove that the products never, at any time or in any store, sold at the list price. See *Helbros Watch Co.* v. *F.T.C.*, *supra*.

Giant also argues that the Commission did not prove that trade had been diverted from its competitors to itself. This is true. But this was not an essential element of the Commission's case. The complaint charged that Giant's practices deceived the public, not that it injured competition. *F.T.C.* v. *Raladam Co.*, 316 U.S. 149 (1942); *Koch* v. *F.T.C.*, 206 F.2d 311 (6th Cir. 1953); *Parke, Austin & Lipscomb, Inc.* v. *F.T.C.*, 142 F.2d 437 (2d Cir.), *cert. denied*, 323 U.S. 753 (1944).

Giant urges that its advertising was not deceptive because the following legend was carried in small print at the bottom of each advertisement:

> "The manufacturer's list prices referred to in this advertisement are inserted to assist you in identification

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[23] Counsel for Giant was able to show that one of the buyer witnesses had erred by several dollars in referring to the "highest price" at which his store had sold the product. The correct highest price, however, was still well below the manufacturer's list price.

of the products and to allow you to compare accurately the selling prices offered here and elsewhere. The use of the term manufacturer's list or similar terminology in our advertising is not to imply that Giant has ever sold the advertised product at such list prices, or that the products are being offered for sale generally in the area at such list prices. Many reputable national brand manufacturers issue to retailers, from time to time, suggested retail list prices that are intended to afford reasonable profits to all retailers based upon their traditional costs of marketing. Giant's employment of self-service supermarket techniques enables it usually to sell below suggested list prices. Consumers, however, have come to recognize most brand merchandise by the list prices, rather than model numbers. Consequently Giant includes these manufacturer's list prices so that you may make simple, intelligent comparisons between our selling prices and those of others."

The Commission's consumer witnesses testified either that they would not normally read such an addendum to an advertisement, or that they had read it and were merely confused by it. That the disclaimer might engender confusion appears to us, as it did to the Commission, to be an understatement. The second sentence disavows any representation of the usual retail price of the product. However, the last sentence appears to assert that the prices "of others" are in fact identical with the suggested list prices. Whether a disclaimer which is in small print and set apart from the main body of an advertisement could ever correct what otherwise would be a deceptive practice, we need not decide. We hold that this particular disclaimer only added to the deceptiveness of the term as used by Giant.

IV

Finally, Giant challenges the scope of the order entered against it by the Commission. First, it urges that the order against the use of "regular price" is not in the public interest, both because the term has not been employed since prior to the time the Commission's complaint was filed, and because Giant has disavowed any intent to renew its use. However, as the Seventh Circuit has stated:

> "Voluntary discontinuance of an unfair trade practice does not necessarily preclude issuance of a cease and desist order. The order to desist from an abandoned unlawful practice is in the nature of a safeguard for the future. Other than the mere discontinuance at an undisclosed time of their practice relating to the guarantee of their merchandise, petitioners have shown no facts before the Commission which would require that this portion of the order be set aside."[24]

On the record it appears that Giant discontinued its reference to "regular price" only after it became aware that the Commission was investigating its advertising practices. That investigation, moreover, was directed to the totality of an advertising program which was possibly deceptive in its impact upon the customers. The order before us represents the Commission's effort to deal finally with the program in its entirety. The voluntary abandon-

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[24] *Clinton Watch Co. v. F.T.C.*, *supra*, at p. 841. See, further, *Goodman v. F.T.C.*, 244 F. 2d 584 (9th Cir. 1957); *Dolcin Corp. v. F.T.C.*, *supra*; *C. Howard Hunt Pen Co. v. F.T.C.*, 197 F. 2d 273 (3d Cir. 1952); *Dejay Stores, Inc. v. F.T.C.*, 200 F. 2d 865 (2d Cir. 1952). See *Standard Distributors, Inc. v. F.T.C.*, 211 F. 2d 7, 13 (2d Cir. 1954): "... the matter of public interest [in filing a complaint after voluntary efforts have been made to remedy the practices] is one in which the discretion of the Commission is broad."

ment of part of the program under the circumstances shown by the record does not disable the Commission from formulating a rule of conduct for the future as broad as the derelictions of the past.

More insistently, Giant advances two reasons why the order as it stands is defectively broad. First, the order allegedly proscribes the use of truthful information furnished by suppliers. What we have already said disposes of this argument. Use of "manufacturer's list price" is prohibited only so long as it is false and deceptive. If prices to which those terms refer are usually and customarily charged in the area, then their use will be "truthful;" and such use is not forbidden by the order.

Giant further argues that the order effectively prevents any use of suggested list price, because of the indefiniteness of the words "usual and customary," and the difficulties posed in determining what prices competing retailers charge. Giant urges that the severity of the penalties for any violation of the order[25] requires a more definite guide to future conduct. The Supreme Court recognized the problem in *F.T.C. v. Henry Broch & Co.*, 368 U.S. 360, 367-68 (1962):

> "The severity of possible penalties prescribed . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."

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[25] Violation of a cease and desist order is subject to a fine of up to $5,000. "Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense." 15 U.S.C. § 45 (*l*).

This Court and other courts of appeals have upheld orders in analogous cases where the words "usual and customary" were used, as here, in relation to prices being charged at retail in a particular trade area.[26] Giant, in addition to its own sound business judgment in the periodic ascertainment of current retail pricing, is not without recourse to the Commission for advice. We adopt the following statement from the Second Circuit in *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F.2d 480, 488 (1962), which suggests that both Giant and the Commission carry certain responsibilities:

> "The difficulties respondent foresees in determining whether it is complying with the order seems factitious. The order contains the usual provision for the filing of a report of compliance . . . and it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts, and thereafter follows it, the Commission will subsequently and without notice claim a violation entailing the civil penalties of 15 U.S.C. § [45(*l*)]. If at some future time respondent should desire to change to a procedure different from what it originally proposed, it need not proceed at its peril. The Commission's offices will still be open for discussion, compare F.T.C. v. National Lead Co. [352 U.S. 419, 431]. . . ."

There being no error, the order of the Commission is affirmed and its enforcement directed.

It is so ordered.

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[26] *See, e.g., Helbros Watch Co.* v. *F.T.C.*, *supra* (pre-ticketing); *Bankers Securities Corp.* v. *F.T.C.*, *supra* (use of "regular price"); *Niresk Industries, Inc.* v. *F.T.C.*, *supra* (use of "regular price"); *Baltimore Luggage Co.* v. *F.T.C.*, *supra* (pre-ticketing).

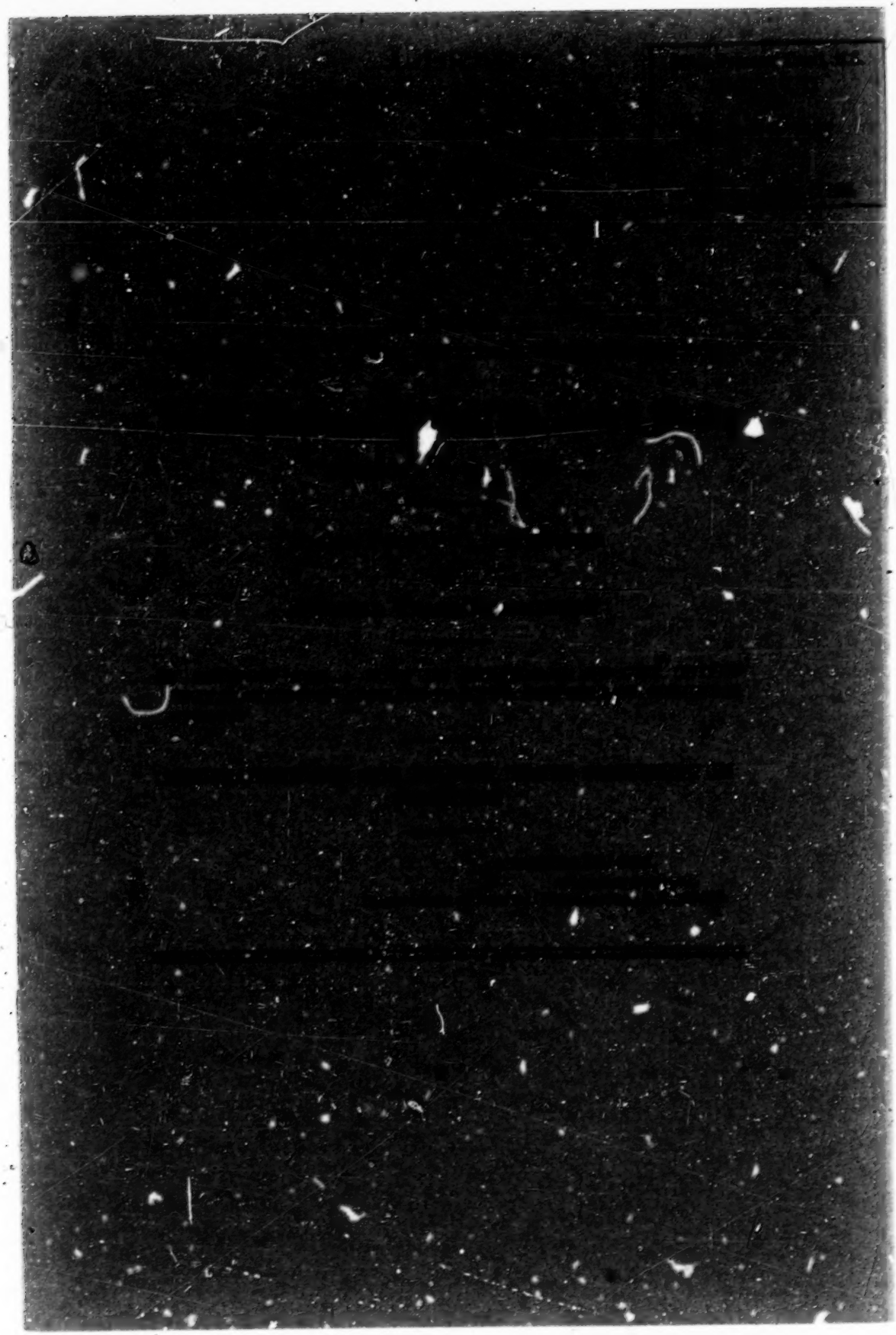
APPENDIX "D"

A partial list of prepriced items sold regularly by Petitioner is set forth below to demonstrate the magnitude of the problem facing the Petitioner under this order unless it is modified. The name listed in parentheses following each item is that of the manufacturer:

Babe pants (Pandus); drop cloth (Gering); thumb tacks (American); rod (Starlzri); moisture (Blue Magic); gloves (Playtex); pastry brush (Empire); nozzle (Gilmore); brush & comb (Formulette); can opener (Vaughan); bottle opener (Cornwall Corp.); soap dish (Selfix); food scraper (Empire); peeler (Ekco); mouse traps (McGill); aluminum dishes (Mirror); envelopes (Camp Mfg. Co.); paper—shelf (Raylies) (Manufac); broom (Empire); sponge mop (DuAll); elec. bids (E Z Pan); record; (Disneyland); sink mat (Rubber Queen); magic cover (Goodyear); moth proofer (Levey Chemical Co.); juicer (Minerware Co.); towel bar (Ekco); burger patty press (Ideaiware); appliques (Susan Bates); crepe paper (Dennison); magic cover edge (Goodyear); 45 rpm inserts (Reconton); juicer (Foley); bottle opener & cap catcher (Thermac T.M.); Scoopmaster (Benny Products); mercerized cotton (Coates & Clark); dye (Tintex); can opener (Handy Dandy); tape (Stay-Tite); Thank You cards (Ambassador); white paste (LePage's); ribbon (Quick Stik); bowl (Pyrex); paper fasteners (Dennison); salt & pepper shakers set (Lustre Ware); can opener (Ekco); zipper (Coats & Clark); cafe clips (Starlyne); measuring cup (Pyrex); pens (Reliance Products); thread (Coats & Clark); needles (Milwands); staples (Arraw); insulated glass (Burrite); thread (Clarks); plastic tape (Scotch Brand); needles (knitting) (Suan Bates); clothes pins (Vermont Plastics); bottle brush (Icomulette); plastic baskets (Gay gem); lint refills (Pixall); cement (LePages); pajamas (Dr. Denton); polish pads (Padco); linen book (Platie Product); spit forks (Hewitt); buttons (LaPetite); gift wrap (Kaycrest); bal-

loons (National Latex Product); poultry bags (Kardite); garment bag (Bagene); ice pick (Goodell Co.); refills (Ill. Water Treatment Co.); freezer tape (LePages); upholstery cleaner (Glamorene); hooks (Evergrip); Bub-L-Air Aerator (Knickerbocker); food stor (Alladinware); salt shaker (Gemco); measuring spoons (Formulette); chalk (Benney & Smith); plastic container (Lustre Ware); pencils (Cromwell); scouring brush (Empire); tablet (Hi Count); party favors (GEM); doilies (Raylies); hose patch (Super Stik); freezer bags (Kardite); freezer labels (HandiStik); cleaning pads (Brillo); books (Pocket Books, Inc.); party favors (GEM); white sauce (French's); prongs (Hardwood Products); cough drops (Vick Chemical Co.); dog tray (Pet Needs, Inc.); plant food (Plant Tabbs Corp.); flea soap (Hartz Mountain); coloring books & crayons (Lowe); necklace & bracelet (Handicraft); sour orange candy (English); planter mix (David Platt Co.); vermiculite (David Platt Co.); peat humus (David Platt Co.); potting soil (David Platt Co.); Hiladendrom soil (David Platt Co.); sterile pads (Bauer & Black); dental cushions (Ezo); tooth paste (Colgate); tooth paste (Pepsodent); Solarcaine First Aid (Planza, Inc.); first aid cream (Johnson & Johnson); gauze pads (Johnson & Johnson); Heet (Whitehall Lab.); Lavoris (Vick Chemical Co.); St. Joseph aspirin (Plough, Inc.); Record cleaning cloth (Edge Limited); erasers (Pedigree); light bulb (GE); ink (Sanfords); candles (Will & Baumer); potato chips (Utzs); potato chips (Mains); potato chips (Lays); potato chips (Wise); plant food (Hiller Gro.); candy (Schraffts); cookies (Southern Biscuit Co.); cookies (Ripon Foods); cookies (Stauffer); cookies (Ann Dale); cookies (F F V); cookies (F F V); cookies (Pepperidge Farms); candy (Babe Ruth) (Curtiss); lollipops (Four Star Candy Co.); bon bons (Schraffts); pistachios (Fisher); milk choc. candy (Schoeners); candy (Schraffts); floor cleaner & bleach (Tally Ho); Johnny mop (Cellulose Prod. Co.); Antral (Boyle Midway, Inc);

gargle (Isodine); Band-Aids (Johnson & Johnson); tooth paste (Lever Bros.); gloves (Pioneer); plastic bandages (Kendall); Right Guard (Gillett); shoe polish (Esquire); dental cream (Colgate Palmolive Co.); Cepacol (Wm. S. Merrill); tape (Johnson & Johnson); can opener (Ekco); tooth brush (Pro Phy Lac Tic); tooth brush (Py Co. Pay Block Drug Co.); tooth brush (Pro Phy Lac Tic); tooth brush (Squibb); tooth brush (Weco Prod. Co.); oral spray (Vick Chemical Co.); bandage (Johnson & Johnson); safety tips (Blue Ribbon Brand); Mercurochrome (Science Lab. Inc.); Curad tape (Kendall Co.); Sucaryl (Abbotts); Pro Perma Grip (Pro Phy Lac Tic Brush Co.); tooth paste (Iodent Co.); Slim Mint Gum (Thompson Medical Co.); Afto Shave & Blades (Gillett); saccharine tablets (Squibb); first aid kit (Johnson & Johnson); blades & razor (Schick); deep heat rub (Mentholatum Co.); shoe polish (Esquire); adhesive tape (Johnson & Johnson); vaseline jelly (Chesebrough Prods. Inc.); Listerine (Lambert Pharmacal Co.); St. spray (Mennen Laboratores); shave cream (Gillette); Polident (Black Drug Co.); Micrin mouthwash (Johnson & Johnson); Medi Quik (Lehr & Fink Products); tooth paste (Barnanger); skin ointment (Plough, Inc.); infra rub (Whitehall Laboratories); Minit Rub (Grove Lab.); dental cream (Squibb).



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 745

GIANT FOOD INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

Petitioner operates a chain of more than fifty retail supermarkets located primarily in the Washington metropolitan area (Pet. 7a). In addition to food products and such "soft" goods as clothing, drugs and soap, petitioner sells a wide variety of durable consumer goods such as housewares and electrical appliances. In its newspaper advertising petitioner frequently compared its selling prices with other prices designated as "Regular," "Manufacturer's List," and words of similar import (J.A. 75).[1]

[1] For example: "Regina Polisher & Floor Waxer—$34.97. Mfg. List $64.50" (*ibid.*). ("J.A." refers to the Joint Appendix filed in the court below.)

724-574 64

After full administrative proceedings, the Federal Trade Commission held that petitioner's use of this comparative pricing was misleading and deceptive, in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) (J.A. 68–73, 75–97), and entered a cease-and-desist order (Pet. 1a–2a). It found that many consumers believe that such words as "Manufacturer's Suggested List Price" mean the "normal", the "going", the "generally prevailing" or the "usual and customary" price at which a product is being sold in the area (J.A. 78). The Commission concluded that there was "a consistent disparity between [petitioner's] advertised manufacturer's list prices and actual selling prices in the trade area" (J.A. 85–86). The court of appeals unanimously affirmed (Pet. 3a–23a).

The only question presented relates to the scope of the Commission's order[2] which prohibits petitioner from comparing its selling price with the "manufacturer's list price," "suggested list price," or "factory suggested retail price" when the latter are not the prices "usually and customarily" charged for the same merchandise in petitioner's trade area (Pet. 1a–2a). Petitioner asserts that the order (1) is too broad since it forbids misrepresentations made in the store as well as by newspaper advertising, and (2) is unduly vague

[2] Petitioner sets forth a number of "additional questions" it claims will be presented "[i]n the event certiorari is granted" (Pet. 3, note). Since petitioner apparently concedes that these additional questions do not, in themselves, merit plenary consideration by the Court, they are not the subject of this memorandum.

because of its reference to prices "usually and customarily" charged in the area. Both contentions are without merit and plainly present no question warranting further review.

1. Having found that the petitioner's newspaper advertising misled consumers by making false comparisons, the Commission did not abuse its discretion by prohibiting the same pricing methods with respect to in-store display and sale. The shaping of the remedy is peculiarly a matter for the Commission's discretion, and it may "close all roads to the prohibited goal * * *." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 614; *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413. Moreover, petitioner did not raise this question before the Commission; it made the argument for the first time in a petition for rehearing in the court of appeals. Accordingly, the argument is not open to it now. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36; *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 457–458. The rule barring judicial consideration of points not raised before the agency applies with particular force to petitioner's assertions with respect to the practical difficulties which will arise in correcting false and misleading prices placed upon merchandise by the manufacturer. Had such contentions been made before the Commission, the agency could have considered them in formulating its order.

2. The court of appeals also properly rejected petitioner's contention that the order's reference to prices that are "usually and customarily" charged in the area is too indefinite, because petitioner has no way of determining what such prices are. As the court below pointed out (Pet. 23a), the courts "have upheld orders in analogous cases where the words 'usual and customary' were used, as here, in relation to prices being charged at retail in a particular trade area." Moreover, as the court also noted (*ibid.*), any serious problems which petitioner has may be resolved when it files its proposed plan of compliance.

In short, the Commission's order represents a reasonable effort to correct petitioner's deceptive comparative pricing program and to protect the public from its recurrence, and is as clear and precise as the nature of petitioner's violation permits.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964